Court File No. 684/00

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

HALPERN *et al*

Applicants

and

CANADA (A.G.) *et al*

Respondents

Court File No. 39/2001

A N D B E T W E E N:

MCCT

Applicant

and

CANADA (A.G.) *et al*

Respondents

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1. Law has power to define a "person", "citizen", "spouse", "marriage". But whatever power law brings to bear in its defining – even limiting lives or ending them – it does not change what is real. Slaves were always persons, even when centuries of law and universal social practice said they were not and condemned them to treatment as property. Women were always persons, despite centuries of rulings and social practice, "since time immemorial", defining them as chattel. This case challenges the Court to recognize that gays, lesbians and bisexuals are fully *persons* in Canadian law, persons who have the fundamental right to civil marriage.

2. History teaches us the dangers of defining human beings outside of civil society. "Definitional boundaries" have been used to oppress historically disempowered groups, by limiting human dignity, potential and freedom throughout history. Persons imprisoned and abducted from their homes in Africa and sold as slaves were deemed outside the "definitional boundaries" of citizenship under the U.S. Constitution. Chief Justice Tanney of the Supreme Court stated in 1856:

> The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing... the question before us is, whether the class of persons described in the plea of abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Scott v. Sandford, 60 U.S 393; 1856 US LEXIS 472 (1856).

3. No society before the eighteenth century in Europe had ever objected to the classification of certain people as property. Yet slavery is now regarded as repugnant. Law was a central figure in maintaining the subordination of people classed as slaves by defining them outside the "definitional boundaries" of citizenship. Courts held that the definition of "person", of "citizen", existed since time immemorial in a manner that excluded slaves. This was said to correspond to the social consensus, the framers' intent, divine or "natural law". The eventual legal recognition of slaves as persons finally came when courts realized what had previously been hidden by racism: slaves were fully persons.

Reply Affidavit of Dr. Trumbach sworn August 21, 2001 at 183, para. 11.

4. In 1928, the Supreme Court of Canada found that women were not "qualified persons" to be appointed as Senators. The Court reasoned that section 24 of the *BNA Act* ought to be interpreted in the same manner as it would have been interpreted when it was first enacted. The Court cited the history of the common law, referenced the language that presumed the masculine gender in the statute, and held that "qualified persons" necessarily excluded criminals, lunatics, imbeciles, and women, "chiefly out of respect for women".

Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867, [1928] S.C.R. 276 at 283-6, 287, 292.

5. The Privy Council overruled the Supreme Court. Rather than rely on a widespread history of denying women access to the public sphere, existing "since time immemorial", the Court stated that "[t]he exclusion of women from all public offices is a relic of days more barbarous than ours..."

> [T]heir Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasons therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development.
>
> *Edwards v. Canada (A.G.)*, [1930] A.C. 124 (P.C.) at 128, 134-135.

6. Women were not considered legal persons for centuries and have been viewed as inferior to men "almost universally" across times and cultures. The pre-legal concept of women's subordination might be said to have "existed since time immemorial" and to reflect "the complementarity of the two human sexes". The recognition of women as legal persons did not require the amendment of constitutions. Rather, courts realized what had previously been hidden by sexism: women were fully persons.

> *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872); *In Re Mabel P. French* (1905), 37 N.B.R 359.

7. Just as women mounted a conceptual challenge in seeking to enter the legal system as persons, gays and lesbians gained entry to the legal system as persons in *M. v. H.* In seeking a declaration that they are free to legally marry, the Applicant Couples seek only the fulfillment of the promise of equality enunciated by the Supreme Court in that case. Our highest Court has already recognized that same-sex couples are spouses entitled to equal respect and recognition. As a matter of law, then, the result in this case should be clear. The problem is that, despite the articulation of a meaningful guarantee of substantive equality from our highest court, discriminatory thinking about lesbians, gays and bisexuals continues.

> *M. v. H.*, [1999] 2 S.C.R. 3.

8. In its factum, the AGC demonstrates that it has not heard the message of *M. v. H.*. Same-sex couples are implicitly described throughout the factum, in opposition to heterosexuals, as having un-"complementary natures", having (and rearing) children in un-"natural" ways, and as un-"fit" for the institution of marriage. They are described as "essentially different" from different-sex couples and therefore rightly excluded from an institution that, in words adopted by the AGC, "is good, does good", represents a "natural drive on the part of most adults", and confers the "inherent goods of individual survival, flourishing, happiness and even perfectibility".

> AGC factum at para. 9; para. 154, 217; para. 119, 139, 144, 149, 151, 159, 222, 232, 257; para. 158, 229; para. 153.

9. Being thus characterized by the government, the Applicant Couples ask, "How can we prove that *we are persons*?" How can we get this Court to *see us* as we know ourselves to be, as families and spouses, rather than as outsiders who "do not fit"? With all of its rhetoric about "context," the AGC has utterly failed to consider the very context that is before the Court -- the lived realities of lesbians and gays.

10. The AGC factum also fails to honour the meaning and value of marriage in the lives of all Canadians. The AGC claims the Applicant Couples are attacking marriage, "assailing the very heart of such a fundamental societal institution." But surely, the "very heart" of marriage must be love and commitment, not the exclusion of gays and lesbians. While the AGC attempts to describe marriage as a mere marker of sex difference, a descriptive status without benefit, the Applicant Couples recognize, respect and support the myriad of positive goods that marriage, and uniquely marriage, provides. The Couples value

participation in the institution as a fundamental personal choice, a means to provide security to their children, an occasion for state, community and familial support, and a celebration of a life commitment to the relationship. The Applicant Couples wish to partake in this essentially *human* expression of enduring love for their spouse, in furtherance of all of the positive purposes of marriage.

11. This Reply Factum will deconstruct the AGC's discriminatory arguments, respond to its position with respect to s. 1 of the *Charter*, and summarize the Applicant Couples' position on remedy. In the process, the Reply will reveal that the denial of civil marriage on the basis of sex or sexual orientation cannot be tolerated in a free and democratic society. The requested declaration must issue accordingly.

A. DECONSTRUCTING THE AGC'S ARGUMENT

12. The Respondents' case is built on one assertion: "Marriage <u>just is</u> the union of one man and one woman." This is said to be a "universal" definition across religions and cultures, because the raison d'Λtre of marriage is "natural" procreation. If this meaning is altered, then the AGC says that society can expect a myriad of unforeseeable, but necessarily destructive, social consequences. This theory, which we call "Definitional Preclusion," is used at every stage of the analysis in order to avoid the requirements of constitutional scrutiny. Indeed, the AGC's *entire case* rests on the assertion that "marriage just is heterosexual." In this Reply Factum, the Applicant Couples will carefully analyze the Definitional Preclusion claim to show that it is entirely without intellectual merit or legal foundation and is discriminatory. Once the AGC's reasoning on this point is wholly deflated, there will be nothing left of its case.

13. The Definitional Preclusion argument is not new. It is the intellectual foundation of oppression employed in all of the significant social struggles of our time. This historical lesson sheds light on the AGC's approach to the issue. The essence of the AGC argument is discrimination. It may attempt to use polite words, and it may purport to rely on "expert" evidence, but the core of the AGC's case is bigotry. Legal history illuminates the discrimination veiled within the AGC argument: these people are "essentially different" – their "marriages" do not and cannot exist.

i. The Definitional Preclusion Argument is Circular

14. The AGC baldly and repeatedly states, couched in poetic clauses, that "marriage is ... heterosexual..." As recognized by the courts of Alaska, Hawaii and Vermont, such reasoning is "circular and unpersuasive".

> *Baehr v. Lewin*, 852 P.2d 44 (Hawaii, 1993) at 61, 63; *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Superior Ct. Feb. 1998)

15. Expert witness Dr. AdΠle Mercier demonstrates that the Definitional Preclusion argument is question-begging and proves nothing.

> An argument *begs the question* when the conclusion it purports to *derive* from the premises is itself one of the premises. Question-begging arguments establish nothing at all. *Of course* if you assume that the moon is made of green cheese, you can prove that the moon is made of green cheese. P *always* entails P.
>
> [The AGC] arguments are question-begging. Most implicitly have the form:
>
> If a marriage is only between a man and a woman (plus some other considerations), then a marriage is only between a man and a woman.

Reply Affidavit of Dr. Mercier, sworn Aug. 31, 2001 at page 4, para. 9.

16. Definitional Preclusion conflates meaning and reference. What a word may have been applied to in the past does not determine what a word means.

> The *meanings* of all words of all languages, (with the exception of personal proper names ...) *always* stretch beyond their current *reference*. ... Since before Emancipation, the word 'citizen' had never been applied to Blacks in the US, it would follow from [AGC's] claim that, as a matter of necessity, Blacks cannot be citizens. [The AGC's Definitional Preclusion argument] commits [it] to the view that Emancipation, by extending its reference, *changed the very meaning of the word 'citizen'*. That is, [it] is committed to the view that, after Emancipation, even whites were no longer citizens according to the usual meaning of that term in the language.
>
> Reply Affidavit of Dr. Mercier, sworn Aug. 31, 2001 at page 6, para. 16.

17. The Definitional Preclusion argument has been repeatedly rejected by the Supreme Court. In *Egan,* both the trial judge and a majority on appeal relied on circular reasoning to find that there was no discrimination, ruling that "the plaintiffs fall into the general group of non-spouses and do not benefit because of their non-spousal status rather than because of their sexual orientation." In contrast, Justice Linden of the Federal Court of Appeal, like a majority of the Supreme Court, recognized that:

> [This analysis] is circular, returning us to the original issue without satisfactorily resolving it. ... [The] issue cannot be resolved simply by stating that the distinction drawn by the Act is based on the definition of "spouse" rather than on sexual orientation. It is, after all, the definition of "spouse" that is being attacked as discriminatory.
>
> *Egan v. Canada* (1991), 38 R.F.L. (3rd) 294 at 308-9 (F.C. T.D.); (1993), 103 D.L.R. (4th) 336 at 346, 366 (F.C.A.); [1995] 2 S.C.R. 513 at 594, para. 161.

18. In *M. v. H.,* the Supreme Court refused to construct definitional boundaries of exclusion around the status of "spouse". Our highest Court adopted a substantive equality

approach to find that the failure to recognize gay and lesbian spouses "perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence". Definitional Preclusion has been rejected at law.

M. v. H., [1999] 2 S.C.R. 3 at 57-58, para. 73.

ii. Definitional Preclusion is Empirically Inaccurate

19. The notion that marriage "just is" heterosexual is empirically untrue. In the gay, lesbian and bisexual community, as well as the broader community, there is widespread cultural, social and historical recognition of marriages between persons of the same sex. Dawn and Julie would be free to marry if they lived in the Netherlands. The editorial boards of two of the leading newspapers in this country, *The Globe & Mail* and *The Toronto Star*, support equal marriage for same-sex couples. Indeed, *The Globe* writes that its achievement is "inevitable". The Clerk of the City of Toronto, with the assistance of the City's legal department, was unsure whether marriage licenses should be issued to the Couples and so brought an application for directions. The marriage of Barb and Gail is not unintelligible. Equal marriage is fully part of modern consciousness.

Affidavit of Dr. Lewin, sworn Nov. 14, 2000; Affidavit of J. Fisher, sworn Jan. 10, 2001, Exhibit E, page 85-89; Affidavit of W.J.P. Jones, City Record 17-20, para. 10-18; Editorial, "Gays and Marriage," *The Globe and Mail*, October 5, 2001, page A16.

20. Many Canadians recognize the reality of same-sex marriages, just as many people recognized Jewish marriages or slave marriages while these were denied legal recognition. The most recent poll shows that 65% of Canadians support equal marriage for same-sex couples. Among those under age 35, there is 80% support. Unfortunately, the AGC

factum misrepresents the evidence on this point, extracting one poll (not properly in evidence – having been marked for identification purposes only) that did not even ask whether same-sex couples should be free to marry. In fact, there is strong social, cultural and historical acceptance of marriage as an institution not exclusively devoted to sexual orientation and sex discrimination. Marriage for same-sex couples does not represent a definitional impossibility. It a social and cultural reality.

> Leger Marketing Poll, June 22, 2001, AGC Supplementary Record at 992, 994; Cross-Examination of J. Fisher, June 19, 2001, Exhibit 3, Angus Reid Group Survey, June 23, 1999, AGC Supplementary Record at 964.

iii. At Root, Definitional Preclusion is Based on Faulty Assumptions

21. Underlying the assertion that "marriage just is the union of one man and one woman," the AGC factum seems to propose three rationales for exclusion: religion, biology and history. First, the AGC at great length appeals to certain theological treatises on marriage and a religious history of marriage. Second, it appeals to biology, arguing that marriage is about procreation and that since gays and lesbians cannot "naturally" procreate, they simply "do not fit" the definition. Third, the AGC appeals to history and tradition, stating that human societies, "since time immemorial", have understood marriage to be exclusively heterosexual, and that this must continue, since the definition is "pre-legal" and "pre-political," having been fixed by God, nature or culture. All three rationales for Definitional Preclusion are wrong in fact and law.

(a) Religious Explanations for Definitional Preclusion Must be Rejected

22. It is surprising, if not distressing, that AGC centers so much of its argument on religious tradition. Our Constitution demands rational justification, not reliance on

majoritarian religious belief. With its lengthy discussion of civil marriage as rooted in "Christendom," references to the teachings of Thomas Aquinas and St. Augustine, and its reliance on "expert" evidence from the official spokesperson of the Catholic Archdiocese of Toronto, the AGC factum is an affront to the secular and the religious diversity that the State is to represent. Canadian society and the recognition of civil marriage are not governed by religious law, but by the Constitution and its values of freedom, liberty, and equality.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

23. Appeals to religious tradition have historically been used to try to justify discrimination. In *Loving v. Virginia*, the trial judge stated that Divine Providence did not permit the State to recognize interracial marriage.

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

As the Hawaii Court noted in *Baehr*, trial judges are not "the ultimate authorities on the subject of Divine Will..."

> *Loving v. Virginia*, 388 U.S. 1 (1967) at 3 (quoting the trial judge); *Baehr v. Lewin*, 852 P.2d 44 (Hawaii, 1993) at 63.

24. In any case, the MCCT application reveals that the Respondents cannot rely on religious definitions as a justification for continuing exclusion. There are religious communities that solemnize marriages between persons of the same sex as a sacrament. Unless the Court is to prefer majoritarian faith traditions to others, a supernatural definition of marriage will not suffice to deny equal marriage.

(b) Biological Explanations for Definitional Preclusion Must be Rejected

25. The Respondents argue that marriage is by definition heterosexual, because the "ultimate raison d'Λtre" of marriage [is] the natural possibility of children". This argument is legally and factually untenable. The nullity of marriage cases demonstrate that procreation is not the purpose of marriage. If the central purpose of marriage were procreation, surely this would be reflected in the law of divorce and annulment. It is not.

Applicant Couples Factum at para. 60; AGC Factum para 232.

26. The House of Lords, the United States Supreme Court, and our Supreme Court have recognized that procreation is not the essential purpose of marriage.

Baxter v. Baxter, [1948] A.C. 274 at 286 (H.L.); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987); *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965); *Moge v. Moge*, [1992] 3 S.C.R. 813 at 848; *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

27. If procreation were the purpose of marriage, many of the Applicant Couples have been wrongfully refused licenses. Seven of the eight Couples have or wish to rear children. Many heterosexual married couples do not; many could not. Access to marriage is denied on the basis of sexual orientation, not capacity or desire to procreate. Sadly, both the AGC factum and the *EGALE* decision assume that words like "society", "procreation" and "children" do not include same-sex families. Entirely missing from the discussion are the hundreds of thousands of children currently being raised by same-sex parents, and who live every day in the shadow of the government's message that their parents are "fundamentally

different" and unworthy of marriage, an institution the AGC admits "is good, does good, and has goods for the couple and their children".

(c) Historical Explanations for Definitional Preclusion Must be Rejected

28. The argument that "marriage is heterosexual" because this represents a "universal norm" "across times and across cultures" is also deeply flawed. First, it flies in the face of the AGC's own expert evidence acknowledging that societies have recognized marriages between persons of the same sex. Hundreds of cultures have celebrated same-sex marriages over the course of history. There is current legal recognition of equal marriage in the Netherlands and soon Belgium. Yet, the AGC insists that a different-sex requirement is "universal".

29. Second, even if marriage had been for heterosexuals-only "since time immemorial", this does not determine the constitutionality of exclusion. The essence of human rights jurisprudence is its mandate to critically evaluate and challenge long-standing historical practices. Since discrimination is itself traditional, there is a grave danger in perpetuating an unconstitutional law by relying on historical precedent. There is a long and shameful history of denying marriage on the basis that the parties were of the wrong race. The AGC's assertion that the Applicant Couples are of the wrong sex is a parallel, equally discriminatory argument that cannot be accepted.

> *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955); *Loving v. Virginia*, 388 U.S. 1 (1967); Affidavit of Prof. Wolfson, sworn Aug. 20, 2001, at 252-252, para. 39; Affidavit of Dr. Koppelman, sworn Aug. 31, 2001, at 190-199.

iv. The AMF "Frozen Rights" Claim is Wrong in Law

30. The respondent intervener, the Association for Marriage and the Family (AMF), offers a different approach to Definitional Preclusion which is completely wrong in law. AMF

argues that the jurisdiction of the federal government and the courts to make laws with respect to "marriage and divorce" is limited by the framers' conceptions in 1867; that the Applicant Couples seek to "change" an invisible, but implicitly entrenched, 1867 definition of "marriage"; and that this can only be done by constitutional amendment.

31. AMF's attempt to freeze meaning in 1867 is legally unsupportable. It contravenes the basic principle of Canadian constitutional interpretation that "the *B.N.A. Act* planted in Canada a living tree capable of growth and expansion within its natural limits."

Edwards v. Canada (A.G.), [1930] A.C. 114 at 136 (P.C.).

32. Section 91 grants Parliament exclusive jurisdiction "to make laws" over a list of matters or subjects. Because "marriage and divorce" is a head of power there is no definition of marriage in s. 91(26). The purpose of section 91 was not to entrench a particular set of rules but to confer jurisdiction to make rules, including jurisdiction to fix the prerequisites for and incidents of the status of marriage.

33. Since "marriage" refers to a topic of potential legislation, it does not contain an internal frozen meaning that reflects the presumed framers' intent in 1867. It must be interpreted "as describing a subject for legislation, not a definite object." Canadian courts have repeatedly declared that the language of the *B.N.A. Act* "must be given a large and liberal interpretation" recognizing "the magnitude of the subject with which it purports to deal in very few words."

Edwards v. Canada (A.G.), [1930] A.C. 114 at 136-137 (P.C.); *Reference Re: Alberta Bill of Rights Act,* [1946] 3 W.W.R. 772 at 778.

34. The "progressive approach" to constitutional interpretation allows the Constitution to change with the needs and values of society. In addition, the *Charter,* as part of the Constitution, must be used to *interpre*t s. 91(26). Only a progressive approach allows a constitution to retain its vigour and avoid obsolescence as society evolves.

> A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one.
>
> *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145 at 155; P. Hogg, *Constitutional Law of Canada,* (looseleaf) (Toronto: Carswell, 1997) at 15-44 to 15-45; *Edwards v. Canada (A.G.)*, [1930] A.C. 114 at 136 (P.C.).

35. Indeed, courts have consistently interpreted the language of the *B.N.A. Act* in a dynamic fashion, in order to include legislative or parliamentary activity that was not specifically addressed by the original document. Courts have done so in order to include concepts that existed or could have existed at the time of Confederation but were not specifically enumerated, and concepts that arose later that clearly could not have been within the contemplation of the framers. It is trite law that the words of the *B.N.A. Act* are not frozen by framers' understandings but must be given a modern and flexible interpretation. As Dickson J. (as he then was) wrote, "there is nothing static or frozen, narrow or technical, about the Constitution of Canada."

> *British Columbia (AG) v. Ellett Estate,* [1980] 2 S.C.R. 466 at 478-9.

36. If the federal power over "marriage and divorce" were somehow limited by an internal definition reflecting the understandings of 1867, there are a significant number of bigamous marriages in Canada today. In 1867, a husband could only petition for divorce if his wife committed adultery. Many divorces have therefore been granted pursuant to legislation that is *ultra vires* and ineffective. If the essential nature of marriage is frozen in1867, the doctrine of coverture should also apply. The subordination of the wife in the identity of the husband was absolutely central to the legal conception of marriage in the 19th century Canada. Accordingly, it would still be definitionally impossible for a husband to rape his wife, husbands would automatically have care and control over the children of the marriage on separation, and a wife could not own property in her own name or sue her husband in tort. The preceding examples illustrate the absurdity of the argument that legislative power over marriage is precluded by framers' understandings in 1867.

v. Definitional Preclusion is Contrary to Section 15 of the *Charter*

37. Definitional Preclusion is no answer to the claim of discrimination. Under the equality guarantee of the *Charter*, the government cannot rely on a history of discrimination, majoritarian religious views, or so-called natural imperatives to explain or justify its continuing discrimination. The AGC claim that same-sex couples are excluded from "marriage" is identical to reasoning that excluded slaves from the category of "citizen" and women from the sphere of legal "persons".

38. The reality is that same-sex couples are persons who love, rear children, form families, get married. When Alison and Joyce turn to each other in moments of crisis and despair, or joy and celebration, and find the enduring love to which they have committed

themselves and shared with their children, they know that they are human beings equally capable of the love and commitment of marriage. Denying them full and equal participation in a fundamental cultural and legal institution would be a monumental failure of justice. It would be contrary to binding law. It would be an evisceration of the promise of equality guaranteed in our *Charter*.

39. Defining people outside the social community is not just a symbolic denial of human dignity. Exclusion from marriage causes real pain and tragic harms. The child of same-sex parents cannot help but wonder what is wrong with her family since her parents are denied the social good of marriage that other children's parents enjoy. Gay and lesbian youth who have grown up with the same hopes and dreams to go to school, get a good job, get married and have kids, kill themselves precisely because they feel like they will never have a "normal" life or (as the AGC factum would put it) they "do not fit". The uncontroverted evidence of Dr. Rosemary Barnes, a psychologist, is that denying equal marriage causes an increase in social stigma, prejudice and violence. In the face of all this, the AGC factum denies these serious harms as entirely subjective, "unreasonable" and in any case trivial compared to the other sources of discrimination against lesbians and gays.

> Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at 132-135; Affidavit of Dr. Kaufman, sworn Nov. 20, 2000, at 333, 337-338, para 14-16, 26-31.

(a) The Meaning and Purpose of Substantive Equality

40. The AGC factum fundamentally departs from well-settled equality rights jurisprudence, deliberately avoiding the careful guidelines of *Law* to try to circumvent the necessary finding of discrimination. Instead, the AGC argument attempts to revert to the discredited similarly situated test abandoned in *Andrews v. Law Society*. The Supreme Court has rejected this formalistic notion of equality, and its focus on "relevant" similarities and differences. Instead, the "focus of the enquiry must always remain upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the [law] has the effect of violating human dignity".

Andrews v. Law Society, [1989] 1 S.C.R. 143; *McKinney v. U. of Guelph,* [1990] 3 S.C.R. 229 at 279; *Law v. Canada*, [1999] 1 S.C.R. 497 at 529, 538, para. 51, 70.

41. A comparison between the decisions in *Bliss* and *Brooks* is perhaps helpful. The *Bliss* decision was based on the similarly situated test (also known as "formal equality"). It concluded that pregnant women did not suffer discrimination when denied maternity benefits since all pregnant persons were relevantly different from non-pregnant persons, and all pregnant persons were treated alike. Since pregnancy was a biological difference, it was not seen as a possible basis for discriminatory treatment. The Court held, "[a]ny inequality between the sexes in this area is not created by legislation but by nature."

Bliss v. Canada (A.G.), [1979] 1 S.C.R. 183 at 190-1, 192; *Brooks v. Canada Safeway Ltd.,* [1989] 1 S.C.R. 1219.

42. When *Bliss* was overruled by the Supreme Court in *Brooks*, the Court made it clear that its formalistic approach was in error. The *Brooks* court was able to see what the *Bliss* court had not – that the differential treatment was discriminatory – by focusing on the impact of the distinction, from the perspective of the claimant, rather than by attempting to locate relevant "natural" differences. The essence of substantive equality, in contrast to the similarly situated test, is to consider the <u>impact</u> of the impugned law on dignity interests from the reasonable perspective of the rights holder, situated within the full social and political context of the claim.

Miron v. Trudel, [1995] 2 S.C.R. 418 at 490-491, para. 136.

43. In this case, the AGC's central thesis, like that of the court in *Bliss*, is that the comparator groups are "essentially different", based on biological factors, and so there is no discrimination. In language almost identical to *Bliss,* the AGC writes, "this is a case where the

difference is pre-existing and not a creation of law..." The AGC attempts to justify discrimination on the basis of a correspondence between the impugned treatment and "natural" facts. Pointing to the "relevance" of "difference" without an analysis of the impact on the claimant in the larger social context, is absolutely contrary to equality jurisprudence.

As McLachlin J. wrote in *Miron:*

> The danger of using relevance as a complete answer to the question of whether discrimination is made out, and thus of losing sight of the values underlying s. 15(1), is acute when one is dealing with so-called "biological" differences. ... [I]f we are not to undermine the promise of equality in s. 15(1) of the *Charter*, we must go beyond biological differences and examine the impact of the impugned distinction in its social and economic context to determine whether it, in fact, perpetuates the undesirable stereotyping which s. 15(1) aims to eradicate.
>
> *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 490-1, para. 136; *Law v. Canada*, [1999] 1 S.C.R. 497 at 517, 537-9, para. 25, 69-71; *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 94-95.

(b) The Appropriate Perspective and Context for a Discrimination Claim

44. In order to properly consider the Applicant Couples' claim, the analysis must "be undertaken in a purposive and contextualized manner". A central purpose of the equality guarantee is to "ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society". To prevent and remedy traditional disadvantage, and appreciate the depth of the human dignity interest, the evaluation of the context must be examined from the perspective of the claimant. "The remedial and holistic nature of the s. 15(1) inquiry obliges this Court to proceed to the directed contextual analysis from the standpoint of acknowledging severe and profoundly patterned historical disadvantages."

Eaton v. Brant County Board of Ed., [1997] 1 S.C.R. 241 at 272 at para. 66; *Granovsky v. Canada*, [2000] 1 S.C.R. 703 at para 79; *Lovelace v. Ontario,* [2000] 1 S.C.R. 950 at para. 59; *Law v. Canada*, [1999] 1 S.C.R. 497 at para. 23.

45. In contrast, while the AGC repeatedly uses the word "context", it urges that the claim be situated within a historical, anthropological and legal narrative that includes no mention of the lived experience of gay and lesbian people. Rather, the AGC's "context" describes and extols a description of the "universal" that reinforces the traditional and continuing erasure of the experience of same-sex families. It defeats the purpose of the equality guarantee to conduct the analysis within the very terms of the discriminatory law under attack.

> If the larger context is not examined, the s. 15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation. A determination as to whether or not discrimination is taking place, if based exclusively on an analysis of the law under challenge is likely, in my view, to result in the same kind of circularity which characterized the similarly situated similarly treated test clearly rejected by the court in *Andrews*.
>
> *R. v. Turpin,* [1989] 1 S.C.R. 1296 at 1332; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 488-491, para 134-137.

46. The Supreme Court has repeatedly stated that the central consideration in a substantive equality analysis is the impact of the distinction, taking the perspective of a "reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim". In the face of extensive evidence of harms described in the Couples' factum, the AGC relies on *Law* and *Granovsky* to suggest that the Couples are making a trivial claim, similar to those who complain that legislative line-drawing has excluded them from a benefit scheme. These cases have no application here. *Law*, for example, concerned a widow who was denied a survivor pension because she was too young to meet the eligibility requirements. The Court held that the differential treatment did not have

the "sting" of discrimination because "[r]elatively speaking, adults under the age of 45 have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada's discrete and insular minorities." Moreover, Ms. Law was not going to experience substantive disadvantage in the long term, as she would receive her benefit at a later age. The benefit was directed at vulnerable elderly persons; Ms. Law had greater opportunity for income replacement due to her youth.

Law v. Canada, [1999] 1 S.C.R. 497 at 555-562, para. 95-110.

47. When the AGC suggests that Ms. Law's situation is analogous to that of the Couples, it has entirely failed to consider the appropriate context. The Couples are members of an historically disadvantaged group whose relationships have traditionally been denied respect and recognition. If the claim is considered from the Couples' perspective – "walking a mile in their shoes" – it becomes clear that excluding them from what the AGC calls "a fundamental social institution" sends the message that they stand outside of society and are less worthy of respect and consideration than different-sex couples. The affront to dignity is obvious.

(c) Discrimination and Dignity

48. In an effort to bolster its position, the AGC trivializes the effects of discrimination, and portrays the Couples as ungrateful whiners whose personal accounts of the effects of exclusion are "anecdotal" and better ignored. Expert evidence of world-renowned scholars is dismissed as "little more than argument". The AGC's view of the Applicants' case is, in fact, patently discriminatory. It analyzes the claim from the very perspective the Applicants seek to challenge. The repeated assertion that gays and lesbians are "essentially

different" and therefore "obviously" excluded from marriage illustrates that the government has never, for a moment, considered the claim from the perspective of the rights-holder.

49. "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment." For same-sex couples to be proud, equal members of the Canadian community, they must have access to the celebration of their relationships by the state through marriage. The numerous and severe effects of exclusion have been canvassed in detail in the Couples' factum. The evidence is unchallenged. We urge this Court to return to the Couples' factum: the evidence of harms to dignity is overwhelming. Viewed from a subjective-objective perspective, there is no question that the denial of marriage licenses to the Applicant Couples is discriminatory.

Law v. Canada, [1999] 1 S.C.R. 497 at 530, para. 53.

B. SECTION 1 OF THE *CHARTER*

50. As discussed in the Applicants' factum, it may not be strictly necessary to consider s. 1. Any prohibition to marriages between same-sex persons exists at common law. As Parliament has not enacted law that it might seek to justify, any judge-made rule that discriminates should simply be reformulated. As Lamer C.J. wrote in *Swain*:

> Before turning to s. 1, however, I wish to point out that because this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the *Charter*, it may not be strictly necessary to go on to consider the application of s. 1. Having come to the conclusion that the common law rule enunciated by the Ontario Court of Appeal limits an accused's right to liberty in a manner which does not accord with the principles of fundamental justice, it could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice. If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the

place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. Of course, if it were not possible to reformulate the common law rule so as to avoid an infringement of a constitutionally protected right or freedom, it would be necessary for the Court to consider whether the common law rule could be upheld as a reasonable limit under s. 1 of the *Charter*. As was noted at the outset of this analysis, this Court has stated that a limit "prescribed by law" within the meaning of s. 1 may arise from the application of a common law rule as well as from a statute or regulation. Thus, I do not wish to be taken as having held that s. 1 can never have application when a common law rule is challenged under the *Charter*.

In a sense, this stage of the analysis is similar to that which would arise if the challenge to the common law rule had not been brought under the *Charter*. Had the parties chosen to approach this issue from the standpoint that the common law rule was simply contrary to basic principles of criminal law, the Court would have been in the position of considering whether the rule could be reformulated so as to remove any inconsistency with basic criminal law principles (principles of fundamental justice), while still obtaining the original objectives. In other words, it is not strictly necessary to invoke s. 52(1) of the Constitution Act, 1982 in order to challenge a common law, judge-made rule on the basis of the rights and values guaranteed by the *Charter* – if a common law rule can be reformulated so as to attain its objectives while removing any inconsistency with basic principles, a judge is entitled to undertake such a reformulation and is not obliged to seek jurisdiction for this action under s. 52(1).

However, this appeal does involve a s. 52(1) challenge to the existing common law rule and, in my view, there are good reasons to go on to consider the application of s. 1 in this case, within the guidelines enunciated in *R. v. Oakes,* [1986] 1 S.C.R. 103. The *Oakes* test provides a familiar structure through which the objectives of the common law rule can be kept in focus and alternative means of attaining these objectives can be considered. Furthermore, the constitutional questions were stated with s. 1 in mind. While this is not, in and of itself, determinative, the Court has had the benefit of considered argument under s. 1 both from the immediate parties and from a number of interveners. In my view, it would be both appropriate and helpful for the Court to take advantage of these submissions.... For the reasons given above, I will now consider whether the existing common law rule can be upheld as a reasonable limit under s. 1 of the *Charter*.

R. v. Swain, [1991] 1 S.C.R. 933 at 978-980.

i. Principles Relating to the Application of s.1 of the *Charter*

51. The AGC bears the onus of justifying its infringement of fundamental rights and freedoms in denying equal marriage. This violation cannot be excused by pointing to historic and existing discrimination against same-sex couples. "Given that s.15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one."

> *Andrews v. Law Society*, [1989] 1 S.C.R. 143 at 153-4; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para 98.

52. The requirement that the limit be demonstrably justified means that mere explanation or speculation will not suffice in justifying a discriminatory law. The objective of the rights denial must be based on evidence, not conjecture.

> To meet its burden under s. 1 of the *Charter*, the state must show that the violative law is "demonstrably justified." The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.
>
> *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para.128-129; *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 478, para. 112; *M. v. H.,* [1999] 2 S.C.R. 3 at para 79.

ii. The Analytical Framework for Section 1 of the *Charter*

53. Although the onus is on the AGC to justify the rights infringement, the AGC factum superficially sets out the steps of the *Oakes* test but then avoids the analysis altogether. The responsibility of bringing a reasoned and principled s. 1 analysis before the Court is thus placed on the Applicants.

54. In *R. v. Oakes*, the Supreme Court set out the requirements to establish that a denial of a right is reasonable and demonstrably justified in a free and democratic society.

> First, the objective, which the measures responsible for a limit on the *Charter* right or freedom are designed to serve must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. ....
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified.

Contrary to the AGC approach, deference is *not* a threshold issue to be determined at the outset of the inquiry.

> *M. v. H.,* [1999] 2 S.C.R. 3 at para 80; *R. v. Oakes,* [1986] 1 S.C.R. 103 at 138-9.

iii. Objective of the "Infringing Measure"

(a) The Characterization of the Pressing and Substantial Objective

55. The limit on *Charter* rights and freedoms must serve a pressing and substantial objective. In a case involving *legislation* that discriminates by withholding a benefit granted to others, the court focuses on the objective of the omission, and as a contextual matter, has regard to the objective of the statute and the objective of the impugned provision. However, in a case of a rights infringement arising at common law, such as this, the court has no statute or provision to consider. The central question is whether the objective of any exclusionary common law rule is pressing and substantial. The enunciation of the objective is crucial to the integrity of the s. 1 analysis.

> Care must be taken not to overstate the objective. The objective relevant to the s.1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised. [Emphasis in original]

RJR-MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199 at para. 144; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 109-111; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para 99-100; *Thomson Newspapers Co. v. Canada (A.G.),* [1998] 1 S.C.R. 877 at para.98, 125; P. Hogg, *Constitutional Law of Canada,* (looseleaf) (Toronto: Carswell, 1997) at 35-18.

(b) A Discriminatory Objective cannot be Pressing and Substantial

56. In order to be sufficiently pressing and substantial to justify overriding constitutionally protected rights and freedoms, the objective of the rights limitation must be consistent with the values of a free and democratic society. As Dickson C.J. wrote:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

A pressing and substantial objective cannot be based on discriminatory rationales. This means that courts cannot require that the group seeking equality lose the identity for which it claims protection, or require that same-sex relationships be "just like" different-sex relationships in all respects. Privileging heterosexuality is not a justification for discrimination; it is the antithesis of equality.

R. v. Oakes, [1986] 1 S.C.R. 103 at 136.

57. The courts have refused to tolerate rights limitations founded on discriminatory objectives. In *R. v. Big M Drug Mart*, the Court held that the purpose of the mandatory

Sunday-closing law was "to compel observance of the Christian Sabbath." That purpose directly contradicted the *Charter* guarantee of freedom of religion. Similarly, in *Vriend,* the Supreme Court remarked that the "legislative omission is on its face the very antithesis of the principles involved in the legislation as a whole". In *Rosenberg,* our Court of Appeal held that failure to include same-sex cohabitants in the definition of "spouse" had the objective of favouring heterosexual unions. The Court held that this objective was "discriminatory and cannot be viewed as justification for a constitutional violation."

> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 116; *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 at 351; *Rosenberg v. Canada (A.G.)* (1998), 38 O.R. (3rd) 577 (C.A.) at 586.

(c) The Courts' Statement of the Objective

58. Since the impugned law exists, if at all, at common law, the task of this Court is to discern the rationale of courts that created the rights limitation. As Lamer J. wrote in *Swain*, "Given that this appeal involves a common law, judge-made rule, the task of the Court under this part of the *Oakes* test is not to construe the objective of Parliament or of the legislature, but rather to construe the overall objective of the common law rule which has been enunciated by the courts."

> *R. v. Swain*, [1991] 1 S.C.R. 933 at 981.

59. Turning to the cases relied on to support the claim of an exclusionary common law rule, it is impossible to find any pressing and substantial objective behind its creation. Circular and discriminatory reasoning has allowed the courts to avoid articulating any rational purpose for denying equal marriage to same-sex couples. In *Layland*, the Divisional Court concluded that unions of persons of the same sex were not properly considered marriages because of the definition of marriage. The decision in *North* also held that "the meaning of marriage is universally accepted by society in the same sense." In the *EGALE* decision, there

is no identification of a pressing and substantial objective to the rights violation, because marriage is defined as "a construct that is, by its nature, not inclusive of everyone." In the alternative, the purpose of exclusion is "preserving the fundamental importance of marriage to the community", suggesting marriage will be demeaned, rendered less important or meaningful, if gays and lesbians obtain recognition. This discriminatory analysis is not an acceptable justification for an equality rights violation. Since the aridity of the Definitional Preclusion arguments has already been demonstrated, it should be clear that there is no rational justification for the courts' denial of marriage to same-sex couples.

Layland v. Ontario (Minister of Consumer & Commercial Relations) (1993), 14 O.R. (3d) 658 (Div. Ct.); *Re North and Matheson* (1975), 52 D.L.R. (3d) 280 at 285 (Man. Co. Ct.); *EGALE Canada Inc. v. Canada (A.G.)* 2001 B.C.S.C. 1365 at para 211.

(d) The Government's Statement of the Objective

60. The decision in *Swain* specifically states that the court is "not to construe the objective of Parliament or of the legislature" when assessing the constitutionality of a common law rule. However, if this court wishes to consider the government's stated purpose of the rights limitation, there is serious difficulty in doing so, at least by reference to the AGC factum.

R. v. Swain, [1991] 1 S.C.R. 933 at 981.

61. Contrary to the Supreme Court's direction that the purpose of the rights limitation must be identified with precision, the AGC factum does not articulate any pressing and substantial purpose served by the exclusion of same-sex spouses from civil marriage. In fact, the AGC never once even attempts to assist the Court by articulating an objective to be

tested in the s. 1 analysis. Instead, the AGC reiterates its discriminatory definition and claims that Members of Parliament agree with it. The AGC then states that marriage benefits society at large and that international human rights conventions accept that marriage is a fundamental human right for heterosexuals only.

62. The Couples wholeheartedly agree that marriage is an important human right according a multitude of benefits. But tellingly, the AGC has *not* argued that the exclusion of same-sex spouses serves any pressing and substantial objective. Rather, it simply asserts that, "the legitimacy of the legislation [sic] is beyond question." This is no answer to the infringement of fundamental rights and freedoms. In contrast to the rigorous standard of review necessary, the AGC provides no evidence or rational argument. Instead, from a discriminatory perspective that completely fails to respect *Charter* values, the legitimacy of a serious rights violation and consequent harms is deemed "obvious". Since the AGC has not offered any rational, and empirically-supported articulation of the pressing and substantial objective of the rights limitation, it has not met its onus and any common law bar must perforce fail.

63. In the alternative, the AGC has left the Court and the Applicant Couples "in the uncomfortable position of envisioning s. 1 arguments on the government's behalf," a failure strongly criticized by the Supreme Court in *Miron*. Left, as we are, to decipher the AGC's purported purposes of the exclusion, we can infer from the factum four possible rationales for the infringement of rights and freedoms: Definitional Preclusion, speculation of unknown but bad consequences, procreation, and discrimination.

Miron v. Trudel, [1995] 2 S.C.R. 418 at 478, para. 110.

1) Definitional Preclusion is not the Objective of Exclusion

64. As demonstrated in this Reply Factum, the AGC's claim that "marriage is heterosexual" is intellectually empty, empirically inaccurate and discriminatory. It is precisely the purpose of s. 15 to interrogate exclusionary definitions and question "universal" or traditional understandings. The rigours of constitutional analysis require the Court to extend beyond platitudes of "what has been, must be", to demand a reasoned, evidentiary-based justification for the denial of fundamental rights and freedoms.

65. After finding a *Charter* breach, the definitional argument - already recognized to be circular and discriminatory - obviously cannot serve as a compelling, rational justification for exclusion. "The task of the court in every case is to identify the <u>functional</u> values underlying the law", not to accept the law's current terms as a static definition [emphasis added].

Miron v. Trudel, [1995] 2 S.C.R. 418 at 503, para. 164.

2) "The Sky Will Fall" is not the Objective of Exclusion

66. Although the Supreme Court could not see a threat to heterosexuals by the recognition of the equality of same-sex spouses, a few of the AGC affidavits engage in highly imaginative story-telling trying to find a danger. However, a demonstrably justified objective cannot be based on bizarre speculation or assumptions. There must be clear and cogent evidence. "[I]t would undermine the very purpose of s. 15 to permit the government to justify a violation of s. 15 by relying on assumptions that may, themselves, be stereotypical and discriminatory in nature." There is no sound reason to believe that heterosexual couples will

cease marrying, cease having children or become less stable just because Michelle and Rebekah will also be able to legally marry.

> *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 478, para 112; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 569, para 94, per L'Heureux-Dubé J.; *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para.128-129.

67. As an example of the truly imaginative and fantastical predictions, one affidavit put forward by the AGC claims that sexual difference is a strain between men and women that must be bridged by marriage. If the marriages of same-sex couples are legally recognized, a Professor of Comparative Religion hypothesizes that heterosexual marriage will cease to be a "cultural norm." This will result in a loss of the "cultural inducements" required to connect men to their children. Men will suffer a worsening of their "current identity crisis" as they "are no longer necessary". This bizarre science fiction fantasy is the AGC's desperate attempt to justify discrimination against gays and lesbians. It is not a rational justification of a serious rights violation.

> Affidavit of Dr. Young, sworn March 14, 2001, AGC Record at 737-744.

68. As Justice Iacobucci wrote in *Egan,* it is inconceivable that the extension of equality to same-sex couples would cause harms to heterosexuals. He wrote:

> On a broader note, it eludes me how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions. Where is the threat? In the absence of such a threat, the denial of the s. 15 rights of same-sex couples is anything but proportional to the policy objective of fostering heterosexual relationships.
>
> *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 211.

3) "Procreation" is not the Objective of Exclusion

69. Procreation seems to be, when pressed, the AGC's ultimate explanation for the exclusion of same-sex couples. A brief consideration of reality and law demonstrates that the "raison d'Λtre" of marriage is not procreation. In any case, under s. 1, the central question is whether the limitation of the right serves a pressing and substantial purpose. Adopting procreation as the objective, the AGC would have to argue that the denial of rights and freedoms in withholding equal marriage is necessary because there will otherwise be a sharp and damaging decline in the birth rate in Canada. The AGC does not and cannot argue this absurd proposition. Surely women will not cease to give birth if gays and lesbians are permitted to legally marry. Even if the AGC were to assert, without evidence, that the exclusion of same-sex couples is necessary to preserve the birth rate, it is questionable whether this is, in fact, a pressing and substantial objective. The world has a serious problem of overpopulation, not a desperate need to preserve civilization by enforcing heterosexual copulation.

(e) The True Purpose of the Infringing Measure: **Discrimination**

70. The federal government's true motivation for exclusion is its belief that heterosexual relationships are uniquely worthy of participation in a foundational social institution. The AGC claims that different-sex relationships are "essentially different", and because of their specialness, uniquely entitled to participate in an institution that "does good, is good". Equal marriage for same-sex couples, it is claimed, would "undermine" the institution, rendering it meaningless. This suggests that the value of the marital bond rests on the ability to privilege, support and affirm heterosexuality, a discriminatory purpose. In fact, seen in this light, the purpose of the exclusion is, quite baldly, *to discriminate*.

71. The AGC does not attempt to identify the purpose of exclusion in specific and clear terms, because there is no pressing, rational objective to denying same-sex couples the freedom to marry. The cases reveal that, if there is a common law bar, it is an artifact of a time when same-sex relationships were not considered to have equal worth. The AGC's purpose in supporting continued exclusion is to declare that heterosexual relationships are more deserving of state support and sanction, a purpose that is discriminatory. Since a discriminatory objective cannot be pressing and substantial, any common law bar is unconstitutional and must be reformulated.

Rosenberg v. Canada (A.G.) (1998), 38 O.R. (3rd) 577 (C.A.) at 586; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 116; *G. (Que.) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66 at 88.

(f) The Laudatory Purpose of Marriage

1) The Requisite Approach: A Functional Objective

72. As indicated above, the issue under the first step of the *Oakes* analysis is whether the limit on *Charter* rights and freedoms furthers a pressing and substantial purpose. Since there is a discriminatory rationale for the serious infringement of fundamental rights and freedoms, it should not be necessary to consider the laudatory objective of marriage itself, but it does sharpen the appreciation of the denial of rights and freedoms.

73. If this Court wishes to consider the general purpose of marriage, we must again avoid any circular or discriminatory articulation of the laudatory purpose. The pressing and substantial objective of marriage cannot be to affirm or benefit heterosexuals. The Court must instead recognize a functional, non-discriminatory objective, lest the *Oakes* test be compromised. The proper approach to determining the salutary objective of a law is to

consider its underlying purposes or functions, not to define its limits according to those to whom it has traditionally applied.

74. This approach is well illustrated by the decision in *M. v. H.* The overwhelming majority of the Supreme Court determined that the legislation was intended to provide an equitable resolution of economic disputes that arise when intimate relationships involving economic interdependence break down. The Court examined the functional objective of the impugned provision, rather than defining the objective in terms of heterosexuality. The sole dissent, by Justice Gonthier, held that the purpose of the Act was limited to different-sex couples only. His reasons are a direct parallel to AGC's argument in this proceeding: there is no discrimination in recognizing "the biological reality of the opposite-sex relationship and its unique potential for giving birth to children and its being the primary forum for raising them." He claimed, like the AGC, that a spouse, by definition, across times and across cultures, means heterosexuals only. The Supreme Court has soundly rejected the very arguments advanced in the AGC factum. It is not proper to attempt to define the purpose of the law by reference to the terms of discrimination itself. Rather, "[w]hen characterizing the objective ... for the purposes of s. 1 analysis, it is important to adopt a functional and pragmatic approach which frames that purpose neither too broadly nor too narrowly."

M. v. H., [1999] 2 S.C.R. 3 at para. 82-107, 85, 156; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 477, 503, para 109, 164.

2) The Government's Dis-Functional and Discriminatory Laudatory Purposes

75. The AGC factum does not adopt the requisite functional or pragmatic approach to the articulation of the laudatory purpose of marriage. In addition to repeating its discriminatory definitional argument, the AGC suggests that the purpose of marriage is related

to heterosexuals-only because the purpose of marriage – its "ultimate raison d'Λtre" – is procreation. This proposition is unsupportable. As previously discussed, procreation is not essential to marriage, in reality or law.

76. The AGC may answer that the birthing and rearing of children is not sufficient. The argument could be that the real marker of marriage is the "naturalness" and uniqueness of the manner in which children may be produced within heterosexual relationships. In other words, marriage is distinguished by the procreative potential, for some heterosexual spouses, of "natural" penile-vaginal intercourse.

77. This is both untrue and offensive. It is wrong because it is contrary to the purposes of marriage reflected at law. Intercourse is not an essential marker of a marriage. Married persons are not required to, nor required to intend to nor required to have the ability to, engage in any sexual relations, including heterosexual intercourse. The AGC's focus on "natural" penile-vaginal intercourse is merely another attempt to justify discrimination by reinforcing the terms of the discrimination. The view is ultimately reducible to the following assertion: Marriage is necessarily heterosexual because only heterosexuals can have heterosexual sex. This is not a reasoned demonstration of a valid and compelling governmental purpose.

78. The AGC perhaps suggests that society must privilege a link between intercourse and children. This view is also unsupportable and discriminatory. The State does not and cannot create classes of "legitimate" and "illegitimate" children to determine which

class of parents would have access to marriage. Children who are adopted, children conceived by donor sperm, or children not biologically related to both parents are not irrelevant to the social good, nor should they be excluded from public consideration. All children are entitled to the state support and accompanying social benefits that would come from the marriage of their parents.

79. Finally, the government implies that it may be justified in denying equal marriage to gays and lesbians because same-sex parenting may have "unknown consequences" for children. The experts for the AGC and AMF extol the virtues of heterosexual parenting, and although they do not and cannot identify any negative consequences to parenting by same-sex couples, they suggest that risks may exist. As outlined at length in the Couples' factum, there is no evidence or theory that would support these discriminatory suggestions.

80. Despite decades of research extensively surveyed by the Applicant Couples' experts, Drs. Barnes, Bigner, and Stacey and Biblarz, the AGC persists in suggesting that there is insufficient evidence that gays and lesbians may positively parent children. Desperate for an emotionally-charged argument, the AGC twists the very strong evidence of Judith Stacey's cross-examination by citing a single statement, taken out of context, to the effect that Dr. Stacey would not suggest that *one* study should be the basis for social policy. The AGC omitted from its quotation the last and conclusive sentence that followed immediately from the passage selected: "It's the cumulative record that counts."

81. The AGC did not fairly present Dr. Stacey's evidence on this point. She actually stated:

> When you replicate findings across a range of studies then you have a solider basis for making policy decisions. It's not -- never perfect. Humans, you know, we don't get -- social science is not the same as laboratory chemical manipulation. We don't have laboratory conditions. However, the more robust you have of findings -- when you get the same finding over and over again through multiple methods in many small scale studies then you have a better basis for acting. When you just have an occasion difference here and there in one small scale you cannot generalize and use that for the basis of further investigation. That's what I was trying to say there. ...
>
> However, what I was saying, and I think I do say later on, is that on the issue of mental health and emotional health and social adjustment of the children, the findings are robust enough -- enough people have been studied that I think policy makers can with some confidence rely on those studies.
>
> Cross-examination of Dr. Stacey, Aug. 2, 2001, p. 32, Q. 149-152

82. The whole of Dr. Stacey's evidence -- unshaken on cross-examination -- can be summarized by the following passage from her re-examination:

> A. ... You know, so when you put all of this together, when you get the same results over and over again you have more and more confidence. When you get a new result you have a new question that you want to investigate, and that's what interests me.
>
> Q. What's the result in which you have confidence?
>
> A. That the children who have been raised by lesbian and gay parents have been -- have turned out to be at least as healthy and in some instances more successful than children, comparable children raised by comparable heterosexual parents. And there is no theory that would lead you to expect differently. There is prejudice that would lead you to expect differently but there's no theory....
>
> Cross-examination of Dr. Stacey, Aug 2, 2001, p. 65-64, Q. 264.

83. Despite the Respondents' attempts to rely on stigmatizing stereotypes, the fact remains that same-sex couples are parenting children. They will continue to do so with or without the protections and benefits of marriage recognition. The question is whether

same-sex couples will be allowed to parent in an environment in which the state discriminates against their relationships or not.

3) The True Functional Purpose of Marriage

84. Canadian courts and legislatures have recognized that the central function of marriage and the family is care, support and love. The evidence, and law, reveals that the purpose of marriage is to recognize, support and encourage the commitment of two persons who wish to share their lives together in an intimate union. As required, this articulation of the objective focuses on the function of the relationship, rather than defining it based on the ground of discrimination.

> *Moge v. Moge*, [1992] 3 S.C.R. 813 at 848; *Mossop v. Canada*, [1993] 1 S.C.R. 554, per L'Heureux-Dubé dissenting; *Family Law Act*, R.S.O. 1990, c. F.3, Preamble.

85. Marriage is recognized as a fundamental right because the profound mutual love, respect, commitment, and intimacy that define that relationship are essential for human dignity and happiness, and are valuable to society as a whole. The state acknowledges that marriage is a fundamental social institution, a natural drive, and necessary for individual fulfillment, but withholds its value when the chosen spouse is of the same sex. What the AGC fails to recognize, and what the Applicants Couples' ask this Court to acknowledge, is that their relationships serve all the same core values as those of their heterosexual neighbours.

iv. The Proportionality Analysis

86. The Applicant Couples have demonstrated that there is no pressing and substantial objective to any common law rule that denies same-sex couples the freedom to

marry. There is therefore no need to proceed with the proportionality test. In the alternative, if the objective is consistent with the *Charter's* normative principles and is pressing and substantial, it is necessary to determine whether the means chosen are reasonable and demonstrably justified.

> In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.
>
> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 108.

87. As in *M. v. H.,* the exclusion of same-sex couples from marriage fails every step of the proportionality test. There is no rational connection between the positive aims of marriage and the exclusion of same-sex couples, no minimal impairment of the infringed rights and freedoms, and no proportionality between the deleterious effects of exclusion and the objective, and no proportionality between the deleterious and the salutary effects of the measures. The denial of rights and freedoms cannot be justified.

(a) There is No Rational Connection

88. To justify the rights infringement, the AGC must demonstrate a rational connection between the infringement and the purpose of the benefit. Again, the government does not even attempt to show that there is a connection between the denial of marriage to a class of persons on the basis of sexual orientation and the objectives of marriage recognition. How does denying gays, lesbians and bisexuals marriage recognition further any laudatory

purpose? Even if the purpose of marriage were solely related to children, despite the overwhelming evidence to the contrary, the denial of equal marriage is not rationally connected to child-bearing or benefitting children. Recognizing the marriages of persons of the same sex will not diminish the number of children born nor will it reduce the quality of care that children receive. There is no rational connection between the denial of rights and freedoms to gays and lesbians and the purpose of the marriage recognition.

RJR-MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199 at para. 153.

89. If the purpose of civil marriage were to support parents or encourage procreation, the exclusion of same-sex spouses, but inclusion of different-sex spouses, would be under- and over-inclusive. Many heterosexual married spouses are childless by choice or lack procreative potential. Many lesbians and gay spouses, like Applicant Couples Alison and Joyce, Barb and Gail, Hedy and Colleen, and Tom and Al, rear children together. The Supreme Court has recognized that "an increasing percentage of children are being conceived and raised by lesbian and gay couples as a result of adoption, surrogacy and donor insemination". Society's interest in providing a stable and loving environment for children would be promoted by allowing same-sex partners the freedom to marry since all children of same-sex couples are denied the benefits and protections that marriage would provide them.

M. v. H., [1999] 2 S.C.R. 3 at para. 114.

90. There is no rational connection between the rights limitation and the purpose of the benefit. In fact, if a functional view is taken of marriage, such as "to recognize and support loving long-term unions," then excluding gays and lesbians frustrates that purpose and

including gays and lesbians furthers that purpose. This same conclusion was reached by the Supreme Court in *M. v. H.* Any limitation in marriage recognition to heterosexuals-only is not justified under s.1 of the *Charter*.

> *M. v. H.*, [1999] 2 S.C.R. 3 at para 116; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 119; *Egan v. Canada*, [1995] 2 S.C.R. 513 at para 191.

(b) There is No Minimal Impairment

91. Even if the denial of equal marriage is rationally connected to a pressing and substantial purpose, the AGC must demonstrate that the Applicant Couples' rights and freedoms have been impaired no more than reasonably necessary to achieve valid goals. The law must set markers for entitlement that impair rights and freedoms as little as possible. Considering the functional purposes underlying marriage recognition, the different-sex requirement is an extremely poor marker. Equal respect and recognition of the marriages of same-sex spouses would further all of the positive goals of marriage recognition. Using the government's procreation-related objectives, the over- and under-inclusive nature of the marker reveals that the limitation is far more than a minimal impairment of the numerous rights and freedoms at stake.

> *RJR-MacDonald Inc. v. Canada (A.G.),* [1995] 3 S.C.R. 199 at para. 160, 167; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 167-175.

92. The government asserts that it is entitled to deference. No deference is warranted. The bar to marriage between persons of the same sex, if any, exists at common law. Since judges are the custodians of the common law, there is no deference owed to the legislature. Rather, the court is responsible for curing the discrimination that arises from its own decisions. As the Supreme Court of Canada held in *R. v. Robinson*:

> ...while decisions of our legislatures may be entitled to judicial deference under s.1 as a matter of policy, such deference is not required where we are being asked to review a law that we as judges have established.
>
> *R. v. Robinson*, [1996] 1 S.C.R. 683 at para.42; *R. v. Swain*, [1991] 1 S.C.R. 933 at 978, 1033.

93. Once again, it becomes apparent that the AGC seeks to have it both ways. When we are addressing s. 15, the AGC suggests that there is a common law bar to same-sex marriage, and it relies on the fact that it has not legislated to say that marriage is a "pre-legal" entity. When we are considering s. 1, the AGC asks for deference to the "unequivocal choice" of an "interpretative clause" of a statute and a Resolution of Parliament. The AGC's inability to bring a consistent, reasoned approach to the analysis reveals the fragility of its position.

94. The AGC cannot rely upon s.1.1 of the *Modernization of Benefits and Obligations Act* – an interpretative clause that purports to recognize the common law definition of marriage – as creating a statutory bar to equal marriage. An interpretation provision that offers the government's view of the common law is not legislation. The section itself expressly states that it does not affect the meaning of marriage, and the Bill was introduced to the House and the Senate in the specific terms that it "is not about marriage and will not, in any way, alter or affect the legal meaning of marriage."

> Bill C-23, *An Act to modernize the Statutes of Canada in relation to benefits and obligations,* 2nd sess., 36th Parl. (Minutes and Evidence, 10 May 2000, 11 May 2000, 17 May 2000, 18 May 2000, Standing Senate Committee on Legal and Constitutional Affairs) (at 3062 of Vol. 9, P 28). See also AGC Factum, para 68.

95. If there was a legislative bar to marriage between persons of the same sex, there would still be little, if any, cause for deference:

> ...[W]here the nature of the infringement lies at the core of the rights protected in the *Charter* and the social objective is meant to serve the interest of the majority as a whole, as represented by state action, courts must be vigilant to ensure that the state has demonstrated its justification for the infringement. A less deferential stance should be taken and a greater onus remain on the state to justify its encroachment on the *Charter* right in question. In each case, therefore, only after the objective of the legislation has been identified can the appropriate degree of deference be determined. Indeed, cases will be rare where it is found reasonable in a free and democratic society to discriminate.
>
> *Adler v. Ontario* [1996] 3 S.C.R. 609 at 667, para. 95; *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199 at para.136, 138

96. As part of its minimal impairment discussion, the AGC incorrectly cites s.1 jurisprudence involving a balancing of the claims of competing groups. These cases have no application to the case at bar. No group will be disadvantaged by granting equal marriage to same-sex couples. Neither is this a case in which the *Charter* rights of one group must be balanced against the *Charter* rights of others; in a case about civil marriage recognition, there is no suggestion that any cleric would be required to solemnize a marriage outside the requirements of his or her faith. Nor is this a budgetary item in which giving to some means taking away from others. There is no maximum number of loving lifetime unions permitted in Canada.

97. The AGC has also mistakenly attempted to rely on a "contextual" analysis following *Thomson Newspapers. Thomson* suggests that the type of proof may vary depending on the context of a case, but the "contextual factors" outlined in the decision clearly demonstrate that deference is inappropriate in this case. Here, the legislature does not seek to protect a vulnerable group (as in *Irwin Toy* or *Ross*). Rather it privileges the majority at the expense of the vulnerable. Parliament has not responded to protect the autonomy or dignity of

any single group under attack from another potentially more powerful group. The impugned law harms the vulnerable, to privilege the more powerful. The government does not seek to safeguard a disadvantaged group based on subjective fears and an apprehension of harm (as in *Keegstra*). It has failed to protect or recognize gays and lesbians. There is no pressing social problem with some difficulties of scientific proof of harm (as in *Butler*).

> [L]ittle deference should be shown in this case where the contextual factors mentioned above indicate that the government has not established that the harm which it is seeking to prevent is widespread or significant.

In this case, there is no harm whatsoever in ending relationship discrimination against lesbians, gays and bisexuals. There is no interest furthered by the exclusion and no deference is warranted.

> *Thomson Newspapers Co. v. Canada (A.G.),* [1998] 1 S.C.R. 877 at para. 118; *Ross v. New Brunswick School District No. 15,* [1996] 1 S.C.R. 825; *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927; *R. v. Keegstra,* [1990] 3 S.C.R. 697; *R. v. Butler*, [1992] 1 S.C.R. 452.

98. The denial of equal marriage does not minimally impair the rights of gay, lesbian and bisexual people. It excludes a class on the basis of a protected personal characteristic for no reason whatsoever. If the raison d'Λtre of marriage were procreation or the support of children, better markers would be available. The line of entitlement has been drawn solely on the basis of discriminatory thinking.

(c) There is no Proportionality of Salutary and Deleterious Effects

99. The final stage of the *Oakes* analysis considers whether there is proportionality between the deleterious effects of the measures that are responsible for limiting the rights or freedoms in question and the objective, and whether there is proportionality between the

deleterious and the salutary effects of the measures. The question is "whether the consequences of the violation are too great when measured against the benefits that may be achieved."

Thomson Newspapers Co. v. Canada (A.G.), [1998] 1 S.C.R. 877 at para. 125

100. In this case, even if the exclusion of same-sex spouses from marriage recognition were otherwise justified, the harms of exclusion are so severe that the violation of rights and freedoms could not be justified. The government can point to no legitimate benefit to the rights denial. This is determinative. In the face of a serious violation of fundamental rights and freedoms, and extensive evidence of numerous, damaging effects to an already disadvantaged minority, there is no benefit whatsoever to the exclusion.

101. Both the government and its interveners attempt to conjure up deleterious effects of recognition and inclusion. They predict that if Tom can marry Al after twenty-five years of commitment together, terrible results will befall Canadian society. There are vague predictions of "unforeseeable" (still somehow definitely negative rather than positive) social consequences. Since the AGC cannot find any reasonable justification for discrimination in marriage, its deponents engage in truly fantastic speculation. These cannot be sufficient justification for discrimination. The fact is that Canadian society will not be ruined by equality for gays and lesbians. The nation will be one step closer to achieving our elusive dream of equality.

102. The Netherlands will soon be joined by Belgium in recognizing marriage for same-sex couples. These countries have not been plagued with social turmoil. Canada has already become more welcoming and embracing of the dignity of all its citizens since many rights and obligations have been accorded to same-sex couples. Every court success has been followed by increased public understanding and acceptance. Now, over 65% of Canadians support the recognition of the marriages of same-sex spouses. A principled, *Charter*-respecting result in this case will not cause chaos in the streets and the decline and fall of society. Equal marriage is just the next step in our journey towards full equality for all peoples.

C. REMEDY: FORMULATING A CONSTITUTIONAL COMMON LAW RULE

103. Where the guarantee of equality has been infringed, the remedy selected must promote "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration". As the Supreme Court affirmed in *Corbiere*:

> In selecting an appropriate remedy under the *Charter* the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the *Charter* and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada.
>
> *Corbiere v. Canada,* [1999] 2 S.C.R. 203 at 281*,* para.110, citing *Osborne* v. *Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 104; *Andrews v. Law Society*, [1989] 1 S.C.R. 143 at 171.

104. Where the impugned rule exists at common law, as in this case, the deferential considerations set out in *Schachter* are not directly applicable. The unconstitutional common law rule must be declared invalid, and the "task of making "difficult choices" falls squarely on

the Court". "It is necessary to reformulate the common law rule ... in a manner that reflects the principles of the *Charter*."

> *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835 at para. 73; *R. v. Swain*, [1991] 1 S.C.R. 933 at 1033.

105. The AGC factum obscures the remedial issue by alternating between a myriad of inapplicable approaches as suits its purpose. Cases involving changes to the common law, without *Charter* considerations (like *Watkins v. Olafson*), have no application. Among common law *Charter* cases, there are two distinct lines of decisions: those (such as *Salituro* and *Hawkins*) in which there is no constitutionally impugned government action but the common law is developed in accordance with *Charter* values, and those that involve government action done in reliance on a common law rule which breaches *Charter* rights (such as *Dagenais* and *Swain*). The case at bar is an example of the latter situation, and the analysis of remedy must therefore be guided by those cases. The test set out in *Salituro* may be sufficient to show that there is no common law bar to the Couples' marriages, as argued in the Applicants' factum. However, the Couples have also asserted a violation of *Charter* rights and freedoms, because this case involves government action (the denial of licenses) in reliance on a purported common law rule. When this Honourable Court considers remedy after finding that judge-made law breaches one or more guarantees of the *Charter*, it is the *Dagenais-Swain* line of cases that govern.

> *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835; *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1131 at 1166-9, para 84-92; *R. v. Swain*, [1991] 1 S.C.R. 933 at 978-80; *R. v. Salituro,* [1991] 3 S.C.R. 654; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Hawkins*, [1996] 3 S.C.R. 1043.

106. In such a case, once the common law rule is found to be unconstitutional, it is declared to be of no force and effect. The Court must then state a new common law rule that complies with *Charter*. In *Swain* and *Dagenais*, the Court's refashioning of the common law rule amounted to the drafting of a new set of guidelines. In *Dagenais,* this involved writing a fresh and detailed set of principles for the issuance of publication bans; in *Swain,* this involved developing a complex set of rules about the Crown's ability to raise a defence of insanity over the accused's wishes. In both cases, the new rule was crafted, and then tested in thorough detail, as if the new rule was then subject to *Charter* challenge. In *Swain,* Lamer C.J., after enunciating what he called "the new common law rule," continued:

> However, given that a new common law rule has been constructed to take the place of the rule which has just been struck down, I believe it is appropriate to consider whether the new rule would offend s. 15 of the *Charter*. The old common law rule was challenged under s. 15, but having found that the old rule violated s. 7 of the *Charter*, could not be upheld as a reasonable limit under s. 1 and was therefore of no force or effect pursuant to s. 52(1), it was unnecessary to consider whether the old rule also violated s. 15 of the *Charter*. The same cannot be said of the new common law rule. As was mentioned above, when the constitutionality of a judge-made rule is in issue, the *Charter* analysis differs from that which is applied to a legislative provision. It is not enough to say that the newly formulated common law rule is less intrusive than the previous rule or even to say that the new common law rule does not limit s. 7 of the *Charter*. If this Court is to enunciate a new common law rule to take the place of the old rule, it is obliged to consider the status of that new rule in relation to all relevant aspects of the *Charter*. In my view, the only other provision of the *Charter* which is directly applicable to the new common law rule is s. 15. As was stated earlier, I do not think that s. 9 is applicable to the issue of the Crown raising evidence of insanity. Accordingly, I will now consider whether the new common law rule limits s. 15 of the *Charter*.
>
> *R. v. Swain*, [1991] 1 S.C.R. 933 at 988-989.

The same approach was applied by Chief Justice Lamer when he reformulated the rule in *Dagenais*. The old rule was found to be offensive to the *Charter;* a new rule was drafted; and the new rule was then meticulously tested under the *Charter*.

> *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835, para 67-97.

107. In this case, if this Honourable Court has concluded that a common law bar on same-sex marriage offends the *Charter*, what new common law rule should be enunciated that would comply with constitutional requirements? What "options" are available that would

survive *Charter* scrutiny? Since the remedy must vindicate the rights infringed, the issue is not complex. It is, as they say, an all-or-nothing proposition. The new common law rule must be that same-sex couples are free to legally marry, and the declaration requested by the Applicants should issue accordingly.

108. The AGC argues that there are "alternative options". The suggestion is that each province could develop a scheme to give same-sex couples all of the material benefits of marriage. Or, perhaps, that the AGC will reserve "marriage" for different-sex couples and give same-sex couples some other kind of legal status. If this Court has concluded that there can be no common law bar to the Couples' marriages, this Court will necessarily have appreciated that this case is about *marriage*. As discussed throughout the Couples' Factum, this case is not about securing second-class "alternative" status to receive financial benefits currently accorded to married couples. It is about access to a deeply meaningful institution; it concerns participation in the activity, expression, security, and integrity of marriage; and it asks for the normalizing and integrative effects of this crucial, life-affirming rite of passage.

109. Whatever the "alternative options" might be, these will necessarily amount to segregation. Segregated status would not survive constitutional scrutiny in the Court's required *Charter* review of the newly developed common law rule. A denial of marriage, drawn on the basis of sexual orientation, cannot be justified on the basis that same-sex spouses are relevantly "different" from heterosexuals and should therefore have a separate institution. Such a "separate but equal" analysis represents the same formalistic approach to equality adopted in *Plessy v. Ferguson* and firmly rejected in *Andrews.* Any "alternative" would offer the insult of formal equivalency, and withhold the *Charter* promise of substantive equality.

Law v. Canada, [1999] 1 S.C.R. 497; *Andrews v. Law Society*, [1989] 1 S.C.R. 143 at 166-168; *Plessy v. Ferguson*, 163 U.S. 537 (1896).

110. In the larger social, political and historical context of the claim, an "alternative" status would perpetuate a feeling of exclusion and second-class status among members of the gay, lesbian and bisexual community. It would also have the effect of condoning and promoting the discriminatory view that same-sex relationships are a threat to the cherished values of our society expressed by marriage. In a society marked by systemic heterosexism, symbolic segregation would result in discriminatory material effects authorized by the power of law. The Couples have adduced overwhelming evidence that segregated status, in the context of wider social prejudice against gays and lesbians, damages dignity interests. The Applicants' experts, including Dr. Eskridge, show unequivocally that materially "equivalent" options deny substantive *equality*.

Reply Affidavit of Dr. Eskridge, sworn Aug. 2, 2001, at 175-176; Cross-Examination of Dr. Eskridge, Aug. 2, 2001, AGC Supp. Record at 704-707, Q. 208, 209; Affidavit of Dr. Eichler, sworn Nov. 15, 2000, at page 226-227; Affidavit of Dr. Lewin, sworn Nov. 14, 2000, at page 204-206; Affidavit of Dr. Ehrlich, sworn Dec. 15, 2000, at EGALE Record at page 104; Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 134-135; Reply Affidavit of Dr. Mercier, sworn August 31, 2001, at page 26; Affidavit of John Fisher, sworn Jan. 10, 2001, at EGALE Record at page 27.

111. Drawing an analogy to the struggles of another disadvantaged group, the AGC's suggestion that there might be "alternatives," or even that what is already available "should be enough," sends the message that gays and lesbians may ride the bus, provided they sit at the back. The lesson of the lie of "separate but equal" is that, even if differential treatment does not result in direct adverse economic consequences, there may still be seriously discriminatory effects. Equality is concerned with dignity, psychological integrity, and

empowerment. As the Supreme Court wrote in *M. v. H.*, the discriminatory impact of segregation has "moral and societal implications beyond economic ones."

> *M. v. H.,* [1999] 2 S.C.R. 3 at para. 73, 124; *Law v. Canada*, [1999] 1 S.C.R. 497 at 530, para. 53; *Canada (A.G.) v. Moore*, [1998] 4 F.C. 585 (T.D.) at 619, 621-622; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 594-595, para. 161; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at page 500, para. 157; *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

112. Segregated status by creating an "alternative" to marriage could never satisfy s. 1. The purpose of denying marriage and adopting an alternative institution could only be framed in a discriminatory manner, just as an "alternative" status for interracial marriages enacted after *Loving* would only have been motivated by discriminatory objectives and would have been unconstitutional.

> Reply Affidavit of Dr. Koppelman, sworn August 31, 2001, at page 193-196; Reply Affidavit of Prof. Wolfson, sworn Aug. 20, 2001, at page 249-251; Affidavit of Dr. Adam, sworn Nov. 15, 2000, at page 496-497; Affidavit of Dr. Calhoun, sworn Nov. 15, 2000, Exhibit "B"at page 526, 528; Cross-Examination of Dr. Calhoun, AGC Supplementary Record at Q. 57, page 610-611.

113. The AGC has already been told that "alternative" status is discriminatory. In 1998, the federal government devised a separate term of "same-sex partner" for gays and lesbians after the Canadian Human Rights Tribunal ordered that it apply the definition of "spouse" so as to comply with the *Canadian Human Rights Act* and the *Charter.* The Federal Court ruled that the "same-sex partner" classification imposed a discriminatory regime of "separate but equal."

> Restricting a group's eligibility for equal benefits (merely on the basis of a personal characteristic related to a ground of discrimination) so that those benefits are available only under a separate or different scheme places a limitation of separateness or difference on the promise of equality. Such a compromise is reminiscent of the now-discredited "separate but equal doctrine," developed by the United States Supreme Court in *Plessy...* which supported discrimination against African-Americans and other people of colour. That doctrine was widely condemned and was officially rejected in the landmark case of *Brown v. Board of Education....* In this country, the separate but equal doctrine was rejected by the Supreme Court in *Andrews...* as a loathsome artifact of the similarly situated approach. One cannot avoid the conclusion

> that offering benefits to gay and lesbian partners under a different scheme from heterosexual partners is a version of the separate but equal
>
> doctrine. That appalling doctrine must not be resuscitated in Canada forty[sic] decades after its much-heralded death in the United States.
>
> *Canada (A.G.) v. Moore*, [1998] 4 F.C. 585 (T.D.) at 619, 621-622 citing, in part, *Egan v. Canada* (1993), 103 D.L.R. (4th) 336 (F.C.A.) at 365.

114. Any new common law rule that permitted segregated status would send a clear message. Gays and lesbians will be tolerated but only when branded "separate," and symbolically forced to inhabit the margins of society. Rather than fulfilling the *Charter's* mandate of substantive equality and promoting full inclusion in Canadian society, any such alternative would foster the discriminatory idea that gays and lesbians do not and cannot enjoy real marriages, and do not have just as loving and important relationships, entitled to equal concern and respect. As the United States Supreme Court wrote in *Brown v. Board of Education,*

> To separate ... generates a feeling of inferiority as to ... status in the community that may affect ... hearts and minds in a way unlikely ever to be undone.
>
> *Brown et al. v. Board of Education of Topeka,* 347 U.S. 483 (1954) at 494.

115. The Applicant Couples therefore submit that the new common law rule should be that same-sex couples are entitled to marry, and that any law, practice or policy that provides otherwise is contrary to the principles of the *Charter.* A new common law rule of equal marriage is the only option that passes constitutional muster.

i. No Suspension of Declaration

116. In *Schachter v. Canada,* the leading case on the issue of constitutional remedies, the Supreme Court of Canada emphasized that a delayed declaration of invalidity should only be issued in extremely limited circumstances:

> A delayed declaration is a serious matter from the point of view of the enforcement of the *Charter*. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation.
>
> *Schachter v. Canada,* [1992] 2 S.C.R. 679 at 716.

117. The Supreme Court has held that the question of whether to delay the application of the declaration of nullity should "turn not on considerations of the role of the courts and the legislature, but rather on considerations ... relating to the effect of an immediate declaration on the public." Again, "[w]hile delayed declarations are appropriate in some cases, they are not a panacea for the problem of interference with the institution of the legislature under s.52."

> *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 716 and 717.

118. A declaration of invalidity can only be suspended in very limited circumstances. In *Schachter*, the Court specified three criteria that can justify the temporary suspension of a declaration of invalidity: (1) danger to the public, (2) threat to the rule of law, and (3) deprivation of benefits from deserving persons without thereby benefitting those whose rights have been violated. None of these criteria apply in this case.

> *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 719; No suspensions necessary in: *Libman v. Quebec*, [1997] 3 S.C.R. 569 at para 42, 54, 57 and 86; *Benner v. Canada*, [1997] 1 S.C.R. 358; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *RJR-MacDonald Inc. v. Canada (A.G.),* [1995] 3 S.C.R. 199.

119. There would be no danger to public safety in a declaration that same-sex couples are free to marry (such as the release of persons acquitted as a result of insanity). It would not threaten the rule of law (such as a finding that judges were not independent) or create a state of emergency (such as the invalidity of all of statutes in Manitoba). A declaration that the common law restriction against same-sex marriage is of no force or effect will not deny different-sex couples the right to marry.

> *R v. Swain*, [1991] 1 S.C.R. 933 at 1014; *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 715, 719, 722; *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at para.83-84, 107; *Manitoba Provincial Judges Assn v. Manitoba (A.G.)*, [1998] 1 S.C.R. 3; *Dixon v. British Columbia* (1989), 59 D.L.R. (4th) 247 (B.C.S.C.) at 281 and 283.

120. In all cases where a declaration of nullity is temporarily suspended, the underlying purpose of the suspension is, as the Court ruled in *Schachter*, "to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations." In this case, the government is actually asking for a suspension for the opposite reason – so that it can implement a segregated scheme that falls short of its constitutional obligations. The result will be that the Couples are left without a meaningful remedy after having proved an infringement of their rights.

> To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur.
>
> *Nelles v. Ontario,* [1989] 2 S.C.R. 170 at 196; *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 719.

121. There are not "any number of possible remedial actions" that will permit access to a fundamental social institution, respect intensely personal life choices, grant access to a

unique expressive resource, and above all, "promote a society in which all persons enjoy equal recognition at law as human beings". There is only one remedy that vindicates the *Charter* rights and freedoms at stake: civil marriage.

122. There is no reason that the rights infringement should persist any longer. Just as Martin Luther King wrote in his famous *Letter from Birmingham Jail*,

> [w]e must use time creatively, in the knowledge that the time is always ripe to do right. ... Now is the time to lift our national policy from the quicksand of injustice to the solid rock of human dignity.
>
> Martin Luther King, Jr., *Letter from Birmingham Jail*, April 16, 1963.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS day of October, 2001,

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